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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of

Liquidation Bureau, Inc.,

Respondent

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Docket No. FIFRA-09-0404-C-84-37

1. Federal Insecticide, Fungicide and Rodenticide Act. -- Child-resistant packaging -- Where chlorinating tabs, packaged in clear plastic-like material, were contained in manufacturer's properly labeled drum which indicated tabs were not to be sold separately, the sale or offering for sale of such individual packages constitutes a violation of the child-resistant packaging requirements of Sec. 25(c)(3) and 40 CFR 162.16 and also constitutes misbranding in violation of Sec. 12(a)(1)(E).
2. Federal Insecticide, Fungicide and Rodenticide Act. -- Civil Penalty -- Where counsel for Respondent withdraws from case prior to hearing and Complainant presents prima facie case, including basis for amount of civil penalty, full amount of such penalty shall be assessed.

Appearances:

Joe M. Romley, Esquire
Robbins & Green
1800 United Bank Building
3300 North Central Avenue
Phoenix, AZ 85012 (Withdrew prior to hearing.)

David M. Jones, Esquire
U. S. Environmental Protection Agency
215 Fremont Street
San Francisco, CA 94105

INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), Section 14(a)(1), 7 U.S.C. 136 1(a) ^{1/} (1) for assessment of a civil penalty for alleged violations of the Act.

Complaint was issued against Respondent Liquidation Bureau, Inc. on June 11, 1984, charging Respondent with offering for sale at Respondent's Phoenix, Arizona place of business, the misbranded product known as PACE 3" CHLORINATING TABS manufactured by Olin Corporation. Said product was misbranded in that the labeling had been detached, altered, defaced or destroyed. The product was offered for sale and sold in a package consisting of a clear plastic-type material which did not conform to the standards established pursuant to Sec. 25(c)(3) of FIFRA (child-resistant packaging). A penalty of \$5,000 was proposed. Respondent answered denying the substantive allegations of the Complaint, in addition to the assertions that the gravity of the purported violations do not warrant a civil penalty assessment, that in computing the amount of the proposed penalty the Complainant has improperly calculated the size of Respondent's business, and that Respondent has filed a Chapter 11 proceeding in the U. S. Bankruptcy Court for the District of Arizona which should serve to

1/ FIFRA, Section 14(a)(1) provides as follows:

Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

stay the proceeding. Thereafter, a hearing was convened in Phoenix, Arizona on February 12, 1985.^{2/}

At the outset of the hearing, Mr. Joe M. Romley of the Phoenix law firm of Robbins & Green, attorney for Respondent, requested permission to present a statement on behalf of Respondent at the conclusion of which Mr. Romley withdrew as counsel in this proceeding.^{3/} Said withdrawal was duly noted in the record and counsel for Complainant was instructed to proceed with the presentation of his prima facie case in the absence of counsel for Respondent.

Findings Of Fact

1. Respondent is an Arizona corporation with its principle place of business located at 3602 N. 35th Avenue, Phoenix, Arizona.
2. Respondent is a person as defined by Section 2(s) of FIFRA [7 U.S.C. §136(s)].
3. The Respondent offered for sale at its place of business the product known as PACE 3" CHLORINATING TABS manufactured by Olin Corporation.
4. PACE 3" CHLORINATING TABS, a swimming pool sanitizer, is a pesticide registered with EPA by the manufacturer, Olin Corporation.

2/ Complainant offered EPA Exhibits 1-9 which were admitted without objection.

3/ Mr. Romley argued that the case in bankruptcy should stay the instant proceeding and he had been instructed by the newly appointed trustees to assert this opinion. The Court rejected that argument based on case law which holds that Commonwealths' (Pa.) injunction was exempt from automatic stay under Bankruptcy Code section exempting from automatic stay an action or proceeding by a governmental unit to enforce such governmental units, police, or regulatory power. Penn Terra Ltd. v. Department of Environmental Resources, 733 F 2d 267 (1984).

5. The formulation of the PACE 3" CHLORINATING TABS requires child-resistant packaging pursuant to 40 C.F.R. §162.16.

6. The PACE 3" CHLORINATING TABS offered for sale by Respondent were in a package consisting of a clear plastic-like material.

7. The PACE 3" CHLORINATING TABS packaged as offered for sale by Respondent bore no label.

8. Respondent had knowledge of the label limitations on the sale of the product because the original package, the Olin Corporation drums, contained a label which indicated that the tabs were not to be sold individually.

9. That Respondent's sales as reported by Dun & Bradstreet, \$4,910,000 was the appropriate number to use in determining the civil penalty applicable to Respondent and that the factual basis for the penalty set out in the testimony of Ms. Papalia is appropriate.

Conclusion

The testimony of Complainant's witness, Rex Neal, Jr., Deputy Administrator, Office of the State Chemist, State of Arizona, Tr., p. 10, states that Respondent ran an ad in the local newspaper in Phoenix, Arizona, in which the product PACE 3" CHLORINATING TABS was offered for sale (EPA Exhibit 1) and, in addition, Mr. Neal received telephone calls from local competition informing the State Chemist's office of the sale of the product by Respondent. Mr. Neal visited Respondent's establishment where he found the product on display and available for purchase by the general public (Tr., p. 11). The PACE 3" CHLORINATING TAB is a sanitizer used in swimming pools (Tr., p. 11).

The telephone messages received by Mr. Neal indicated that the product being sold by Respondent was not in child-resistant packaging as required by law. Upon inspection of the display of the offending product at Respondent's establishment, Mr. Neal found that the product indeed was not in child-resistant packaging but a "clear cellophane package with no identification whatever" (Tr., p. 11; EPA Exhibit 3). Upon further inspection of Respondent's premises, Mr. Neal found about fifty of the original drums of the product as shipped by the manufacturer which contained a label reading, "Not to be sold in individual container" (Tr., p. 14).


Mr. Neal acquired samples of the product in question (EPA Exhibit 2) and these samples were sent to the State of Arizona's laboratory for analysis (EPA Exhibit 7). It was from this analysis that Mr. Neal confirmed the fact that the product met the regulatory requirement for child-resistant packaging. Complainant's witness, Robert Magnenat, assisted by explaining the chemical nature of the offending product and by interpreting in laymen language the criteria set forth in the regulations at 40 C.F.R. §162.16 for child-resistant packaging (Tr., p. 29-32).

The information relative to the Respondent's conduct involving the product PACE 3" CHLORINATING TABS was forwarded by Mr. Neal to Ms. Kathryn Papalia at EPA, Region 9, who determined that Section 14(a) of FIFRA [7 U.S.C. §136 1] authorized the assessment of a civil penalty. A proposed penalty was calculated using the Guidelines published by EPA at 39 Fed. Reg. 27711, and EPA Exhibit 8).

ORDER^{4/}

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Sec. 14(a)(1), 7 U. S. C. 136 1(a)(1), a civil penalty of \$5,000 is assessed against Liquidation Bureau, Inc., for violation of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk, P. O. Box 360863M, Pittsburgh, PA 15251, a cashier's check or certified check payable to the Treasurer, United States of America.


Edward B. Finch
Chief Administrative Law Judge

Dated: May 16, 1985
Washington, D. C.

4/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the final order of the Administrator. See 40 C.F.R. 22.27(c).